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No. 88-762

IN THE

Supreme Court of the United States

October Term, 1988

O. GEORGE SPECHT, JR., and JUNE B. SPECHT,
Petitioners,

v.

ROGER JENSEN, DOUG MARTIN, and DON OWENS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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December 30, 1988

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In their Opposition Brief, Respondents assert that Petitioners:

> [F]ail to address the only issue considered by the Tenth Circuit, *en banc*, to wit:
>
> Whether Fed. R. Evid. 702 premits [sic] an attorney called as an expert witness in a . . . § 1983 action to state his views of the law which governs the verdict and opine whether police officers' conduct violated that law.

The inaccuracy of this statement, and one of the bases for Petitioners' Writ of Certiorari, is that the "flip-flop" opinion of the Tenth Circuit, on its *en banc* rehearing, fails to provide any coherent legal standard to distinguish proper expert testimony from that giving rise to reversible error, and flies in the face of the Court's prior reasoned analysis upholding

Petitioners' right to expert opinion testimony. The *en banc* opinion of the Tenth circuit is in direct, real, and intolerable conflict with appellate decisions in other circuits.

Prior to the adoption by Congress in 1975 of Rules 702–705 of the Federal Rules of Evidence, traditional evidentiary rules regarding expert testimony varied significantly from state to state and circuit to circuit. The uniformity which Congress intended in enacting Rules 702–705 has not occurred. The Federal Circuit Courts are in grave and irreconcilable conflict relative to these Rules and the result has been manifested in divergent opinions, strident dissents, conflicting analyses, and controversial rulings. The disharmony among the circuits has bred confusion among practicing counsel, antagonism among judges, even within the same circuit, disaccord between trial courts and appellate courts, and grave injustice to those who suffer the effects of the current chaos in the circuit courts.

Such is the case presented herein. The Petitioners were awarded damages by a jury after a five day trial on the merits arising under 42 U.S.C. § 1983 and Colorado law for the unlawful search of the Petitioners' home and business. The jury heard an enormous amount of evidence in reaching their decision, part of which entailed proper expert opinion testimony relative to the search and consent issue. Such testimony was properly admitted by the Trial Court, properly considered by the jury, and duly upheld and affirmed on the original Appeal.[1]

It was only later, pursuant to a request for rehearing by the Respondents to which Petitioners were *not* allowed to respond, that the Tenth Circuit *en banc* inexplicably *reversed*

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[1] 832 F.2d 1516 (10th Cir. 1987), reprinted as *Appendix A* to Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

itself *and* the Trial Court and concluded that some of the expert testimony presented at the trial was now inadmissible.[2]

The Tenth Circuit's *en banc* reversal of its prior ruling affirming the propriety of the Trial Court's decision to admit the subject expert testimony directly illustrates the enormity of the confusion among and between the circuits and dramatically represents the gravity of the problem caused by the gross disparity in circuit court rulings. In its original opinion affirming the Trial Court's decision to admit the expert testimony, the Tenth Circuit *emphatically* ruled that the expert testimony had been properly admitted and that Respondents' objections thereto were "without merit." The Tenth Circuit, as did the Trial Court, firmly *rejected* the Respondents' arguments that the expert testimony somehow invaded the province of jury.[3]

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[2] 853 P.2d 805 (10th Cir. 1988), reprinted as *Appendix B* to Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[3] It is clear that Congress intended through its enactment of Rules 702–705 to increase the acceptance of expert testimony by trial courts, and such courts have generally found that if there is a limit to their discretion as to whether an expert should be allowed to offer opinion testimony, that limit is on their discretion to exclude the expert at trial. *See, e.g., Friendship Heights Association v. Vlastimil Koubek*, 785 F.2d 1154 (5th Cir. 1986); *Dixon v. International Harvester Co.*, 754 F.2d 573 (5th Cir. 1985); *Garrett v. Desa Industries Inc.*, 705 F.2d 721 (4th Cir. 1983); *Zenith Radio Corp. v. Matsushita Electric Industries Co.*, 723 F.2d 238 (3d Cir. 1983); *Knight v. Otis Elevator Co.*, 596 F.2d 84 (3d Cir. 1979).

In its original opinion, the Tenth Circuit made clear that the Trial Court's exercise of its discretion in admitting the subject expert testimony was proper:

> Experts may give opinions if their specialized knowledge will assist the fact finder to understand the evidence or to determine a fact. Fed. R. Evid. 702. Significantly, as set forth above, an opinion is

The Tenth Circuit's original decision was based on a thorough review of the record and a precise application of prevailing law. The Tenth Circuit was *unequivocal* that the matters which the Respondents have raised as error were "matters committed to the discretion of the trial court," and concluded that "we are not persuaded that an abuse of discretion occurred."[4]

The Tenth Circuit's *en banc* 180-degree reversal of itself flies in the face not only of its prior reasoned analysis, but also creates an internally inconsistent position by the Tenth Circuit and an

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> admissible even though it goes to an ultimate issue to be decided by the fact finder. Thus, to the extent [Respondents] contend that the Court erred by allowing [the expert] to express an opinion on an issue [Respondents] agreed was a jury question, their argument is without merit.
>
> *[Respondents] also assert that reversible error occurred because [the expert] improperly told the jury what law to apply. We disagree.* Although it constitutes error to allow a witness to instruct the jury on the applicable law [citations], a review of the entire record demonstrates that no such improper instruction occurred here . . . In addition to instructing the jury that it must apply the law as stated in the Court's instructions, the Court also informed the jury that it could determine what weight, if any, should be given to the expert testimony. *Under the circumstances, we are not prepared to say that the jury misunderstood its duty to follow the law given by the Court or that it gave improper credence to any legal definitions embodied in [the expert's] testimony.* [emphasis added]

Appendix A at pp. 33-34, attached to Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[4] *Appendix A* at p. 31, attached to Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

inherently contradictory approach to the admissibility of expert testimony and the broad discretion granted trial courts in such matters. Nothing emphasizes more the grave and irreconcilable conflict among and between the circuits, indeed within the circuits, as does this incongruous and inexplicable decision.

Equally illustrative of the real and intolerable conflict of law currently prevailing among the circuit courts regarding the use and admissibility of expert opinion testimony is the position taken by Respondents in their Brief in Opposition.[5]

Respondents' Opposition Brief contains numerous citations to various circuit court opinions which, Respondents claim, support their position that the expert opinion testimony admitted by the Trial Court and initially affirmed by the Tenth Circuit constituted reversible error. Petitioners do not quarrel with Respondents that the cited cases basically stand for the propositions for which they are presented. By contrast,

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[5] Much of the Respondents' Opposition Brief is devoted to a rehash of the factual arguments surrounding the subject expert's opinion testimony at trial. However, these factual arguments are not the issue before this Honorable Court. The issue before this Honorable Court is a *legal* one, not a factual one. Moreover, the Tenth Circuit's original decision aptly dispensed with the Respondents' factual arguments and concluded that there were not factual errors that could constitute grounds for a reversal of the Trial Court's decision. *The reason for Petitioners' Writ of Certiorari is based upon the Tenth Circuit's application of a different and conflicting legal standard in reversing both itself and the Trial Court on the issue of admissible expert opinion testimony.* Petitioners' Petition for Writ of Certiorari is equally based upon the critical need for a resolution of the grave and irreconcilable conflicts in legal rulings and the disparity of legal analyses utilized by the Federal Circuit Courts on this issue. Because the factual issues raised by the Respondents are, therefore, really non-issues, and because they were adequately addressed and rejected by the Tenth Circuit in its original opinion, the Petitioners will not belabor the point herein.

Petitioners are sure that the Respondents will not contest that the string of Federal Circuit Court decisions cited by Petitioners in their Brief stand for the proposition that the subject expert opinion testimony was *properly* admitted by the Trial Court and did *not* constitute reversible error. Thus, it is critical to point out that Respondents' attempt to muddy the waters through an irrelevant factual presentation has nothing to do with the irreconcilable legal conflict inherent in the disparity of judicial rulings and analyses presented by the Federal Circuit Courts. This Honorable Court is not called upon to address the factual arguments which the Respondents have raised. **Rather, this Honorable Court is called upon to resolve the grave and irreconcilable legal conflict inherent in the wealth on conflicting and inapposite Federal Circuit Court decisions on the issue of the use and admissibility of expert opinion testimony.**

Finally, it must be noted that the judicially inexplicable and legally inconsistent flip-flop by the Tenth Circuit has effectively precluded Petitioners from proving their case and from asserting a claim to which they are statutorily entitled under 42 U.S.C. § 1983. The Tenth Circuit's conflicting decisions to first allow and then disallow the subject expert testimony leave counsel and their clients confused, without judicial guidance, and in perpetual ambiguity relative to proof of their statutorily enacted claim at trial. If Petitioners cannot utilize what has been held to be proper expert testimony in numerous judicial rulings in analogous circumstances, then the Trial Court should be allowed to rule on the issue as a matter of law, an avenue which Respondents, through objection, precluded at trial. *In short, Petitioners have been effectively deprived of the* ***proof*** *necessary to establish their statutorily entitled cause of action by a flip-flop decision which is both internally inconsistent and inherently contradictory, and which is in irreconcilable conflict with sister circuit courts.* The Tenth Circuits' confusing decision

leaves Petitioners without the means to prove their case and devoid of any guidance as to a remedy.

This Honorable Court has frequently invoked its jurisdiction where reported decisions of the Federal Circuit Courts are in conflict. *See, e.g., Switzerland Cheese Association Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966); *United States v. Standard Rice Co.*, 323 U.S. 106 (1944). **The circuit-by-circuit citations set forth in the Briefs of both the Petitioners and the Respondents are dramatic and irrebuttable evidence of real and intolerable conflicts among and between the Federal Circuit Courts.** The guidance of this Honorable Court is not only necessary, but also mandated in order to bring about the uniformity guaranteed by Congress in enacting Rules 702–705 of the Federal Rules of Evidence. Far beyond the immediate need to rectify the currently intolerable conflict among the circuits is the undeniable and compelling need for this Honorable Court to exercise its discretion in granting Certiorari and immediately resolving this conflict.[6]

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[6] Justice Frankfurter once noted, quoting Chief Justice Vinson:

> The debates in the Constitutional convention make clear that the purpose of the establishment of one supreme national tribunal was . . . to 'secure the national rights and uniformity of judgments.' [citations omitted] *The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts . . .* To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. [emphasis added] *Dick v. New York Life Insurance Co.*, 359 U.S. 437, 452–54 (1954).

This Honorable Court is herein called upon to exercise one of its most time honored and critical functions — to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise its supervisory power over lower federal courts. The questions of law raised in Petitioners' Writ of Certiorari have an immediate importance far beyond the facts and parties involved herein and go to the day-to-day activities taking place in trial and circuit courts across the nation. It is not necessary for Petitioners to address each and every factual and legal issue raised by Respondents in their Opposition Brief; rather, Petitioners' Petition for Writ of Certiorari must establish this Honorable Court's grounds for jurisdiction and the invocation of its powers of Certiorari. This, Petitioners respectfully submit, has been done.

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